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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

KERN, INYO AND MONO COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL and GOLDEN QUEEN MINING CO., LLC	CASE 31-CE-129697 BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I

INTRODUCTION

After having perpetrated a fraud on the Kern, Inyo and Mono Counties Building and Construction Trades Council ("Council" or "Respondent") and the other Unions which negotiated and signed a Project Labor Agreement ("PLA" or "Agreement") for the construction work involved in Golden Queen Mining Co., LLC ("Employer") mining operation, Employer seeks to avoid its obligations reached in those same negotiations.

This case presents the question of whether a PLA entered into between Employer, the owner and construction manager of a multi-million dollar Soledad Mountain gold mine project ("Project"), and the Council is protected by the proviso to Section 8(e) of the Act.

In answering that question, the parties addressed (1) whether Golden Queen is "an employer in the construction industry" within the meaning of the proviso to Section 8(e) of the Act, (2) whether the PLA was entered into in the context of a collective bargaining relationship, and (3) whether the PLA was executed for the purpose of preventing conflict between union and non-union employees working on a common construction situs.

The question, as to whether Golden Queen is an employer in the construction industry within the meaning of the proviso to Section 8(e), has arisen because representatives of Golden Queen **told** representatives of the Council and its affiliated construction unions ("Unions") that it was negotiating with, that it would be directly hiring construction employees to perform jobsite work, and that Employer would be acting as its own general contractor, and after having **agreed in writing**, in the terms and conditions in the PLA itself, that Golden Queen is an employer in the building and construction industry because at the commencement of construction and as of the date of executing this Agreement, it directly employs persons in the building and construction trades, will employ such persons on the Project and will continue to do so until completion of the commissioning of the Project and that Golden Queen would build the construction portion of the Project with a 100% union labor force represented by the Unions under the terms of the PLA, Golden Queen reneged on that agreement, arguing that although those representations and warranties were a sham, Board law still allowed Golden Queen to repudiate its Agreement.

The complaint alleges that on or about August 20, 1997, Golden Queen and the Council, entered into an agreement which provided that all contractors or subcontractors performing

covered work on the Soledad Mountain Project shall be signatory to the agreement and the multi-employer collective bargaining agreement with one or more of the Unions for the Project only. The complaint further alleges that the Council has entered into, maintained and given effect to an agreement by which the Employer has agreed to cease doing business with another employer or person, in violation of Section 8(e) of the Act.

II

STATEMENT OF FACTS

A. NEGOTIATIONS FOR THE 1997 PROJECT LABOR AGREEMENT

Richard Graeme was employed as the Vice-President of Operation for Golden Queen from 1996 to 1999 with the primary responsibility of overseeing the permitting of the Soledad Mountain project. (ALJD 3: 4-10) **1/** Graeme ultimately signed the PLA between Golden Queen and the Unions for the construction of the Soledad Mountain project. (RT 26) **2/**

Graeme testified that the Unions first approached the Employer about the PLA and that he found out about the PLA on June 8, 1997 **3/** when his attorney, Jim Good, faxed the proposed draft PLA to him. (GC Ex. 4)(ALJ 5:10-11) Both Graeme and attorney Good made some notes on this draft and Graeme sent it back to Good. (RT 30-31) Good sent back another draft to Graeme (GC Ex. 5) again, with some hand written notes on it from Good (RT 32) Good then Faxed Graeme a copy of a final draft PLA to Graeme (GC Ex. 6) (RT 34)

According to Graeme, the Project was going to be built using an Engineering Procurement and Construction Management (EPCM) technique. (RT 30) This technique turns over responsibility for a project to a third party who is responsible for: the final engineering

[1] ALJD refers to the page of the Administrative Law Judge's decision followed by the line numbers.
[2] RT refers to the Reporters Transcript followed by the page number referenced therein.
[3] Graeme later corrected himself in stating that he first learned of the PLA on July 8, 1997.

documents, procuring the necessary materials and equipment, construction management and employment of contractors. (RT 30) Graeme testified that he had requested a feasibility study be prepared for the Project by M3 Engineering, (RT 49) but that study was never used in the construction of the Project. (RT 92) Graeme had the authority to require contractors performing Project work to sign the PLA (RT 96) or otherwise not be awarded Project work if they failed to do so. (RT 97)

According to Graeme, Employer never intended to act as its own general contractor, choose its own subcontractors or intend on hiring employees in the building and construction trades. (RT 48) Instead, Employer would use an EPCM entity which would complete the final engineering documents, procure all materials and equipment, employ contractors and act as the construction manager for the Project. (RT 30, 58) When construction ultimately started on the Project, however, Employer did not use the EPCM technique. (RT 205)

As to the PLA, Graeme testified that notwithstanding that section 1.5 stated that the Employer directly employs persons in the building and construction trades, will employ such persons on the project, and will continue to do so until completion of the commissioning of the project and, notwithstanding his assertion that Employer did not intend to directly employ persons in the building and construction trades, Graeme signed the PLA because "… that's the way it was supposed to be." (RT 64) Graeme further testified that Employer negotiated the PLA for the EPCM contractor to sign. (RT 85, 6-9)

The ALJ credited Graeme's testimony that he never told the unions involved that the Employer would act as its own general contractor and that it wanted to choose subcontractors on the project, that it would supervise the day-to-day onsite construction work, and that it wanted to directly hire employees in the building and construction trades. (ALJ 6:12-19) Graeme

purportedly remembered this notwithstanding his admissions, on cross examination, that he did not remember attending any of the negotiations for the PLA, being involved in the PLA negotiations, when the PLA negotiations took place, where they took place, who attended, or what was discussed. (ALJ 6:27-30) If one cannot remember what was discussed at negotiating sessions, how can one remember what he did not tell the Unions?

Mitch Rolow was the business manager of the International Brotherhood of Electrical Workers (electricians union) Local 428 located in Kern County, California from 1992 thru May, 1998. (RT 396) He testified that during that time period, there was a general decline in the amount of construction work being performed on a union basis. (RT 400) Most of the construction jobs were a mix of union and non-union contractors. (RT 402) As to the picketing of non-union construction sites, "There was always someone picketing." (RT 401) When another union picketed on a job where union electricians were employed, Rolow testified that it disrupted the flow of everything on the job. (RT 403) When there was picketing by another Union and if the Union electricians working on the job that was picketed honored the picket line and refused to go to work, the electrical contractor was threatened to be removed from the job. (RT 449-449)

Rolow was involved, on behalf of the electricians, in the negotiations for the PLA for the Project. (RT 405) All of the building trades participated in those negotiations. (RT 405) Prior to negotiations beginning, there was a luncheon meeting between the Employer's representatives and Unions. (RT 407) There were three (3) subsequent negotiating meetings. (RT 408) Employer's representatives and Rolow discussed the Employer's desire of hiring electricians directly on the Employer's payroll (RT 409-410; 438-439) and Rolow helping the Employer in getting its permits from the local regulatory agencies. (RT 411) At the negotiations, there were proposals and language exchanged between the negotiating parties (RT 412), with them going

thru each and every one of the proposals, as submitted. (RT 413) The parties, specifically discussed harmonious relations between the parties and the No-Strike, No-Lockout clause contained in Article 7 of the PLA. It was important to have that language to have the project go smoothly and avoid employees be off from work due to a strike. (RT 418-9) The parties discussed that each subcontractor performing project work would have to be signatory to the craft unions master labor agreements for the project (RT 421) and specific picketing issues then going on at a local high school at Edwards Air Force base as well as at China Lake. (RT 425-26)

The ALJ found Graeme's testimony credible that the Employer at all times intended to hire an EPCM general contractor and the documentary evidence in the form of M3 Engineering's feasibility report that the Employer intended to hire an EPCM general contractor, and that Rolow's 18-year-old testimony incredibly convenient and tailored to Respondent's position. (ALJD 7:1-5) If Graeme was so credible in testifying that Employer "intended to hire an EPCM general contractor" how does one account for no mention of that intention in the PLA; to the contrary, the language of the PLA corroborates Rolow's testimony that Employer told the union representatives at the negotiations for the PLA that it intended to act as its own general contractor and directly hire construction employees for the performance of project work and subcontract out other work to be performed?

Ray Simmons was the business representative and financial secretary of Carpenters Local 743, which covered the Kern, Inyo and Mono county area, from 1976 to July 2013. (RT 456-7) During the 1995-1997 time frame, 50 to 60 percent of the construction projects in the area were performed on a non-union basis. (RT 457) During the same time frame, Simmons spent 20 percent of his time in picketing activities. All of the other building trades unions were similarly engaged in picketing activities. (RT 459) When carpenter members honored the picket line of

other construction unions, some of the contractors for who those members worked would be removed from the job. (Ibid)

Simmons was involved in the negotiations that resulted in the PLA for the Project as well as PLAs for other projects in the area. (RT 460) At the first negotiating meeting between the parties, Employer presented a layout of the intended project, stated that they wanted help in the permitting process for the job and that they wanted a qualified workforce to draw from. (RT 462) Employer's representatives stated that they were going to self- perform project work and would be hiring, directly, members of the various trades to perform that work. (RT 462, 478) According to Simmons, the Council's Executive Secretary at the time, Doug Zimmerman, provided a draft copy of a PLA to the Employer and thereafter, the parties exchanged various written proposals. (RT 464) The parties reviewed each and every section of those proposals. (RT 466)

The ALJ further found that in light of the Employer's documented plans to use an EPCM contractor for the Soledad Project as well as its lack of in-house expertise in construction, he found it hard to believe that representatives of the Employer told Simmons that they would act as their own general contractor and directly hire members of the trade unions. (ALJD 7:25-31) Yet that is exactly what Employer did when Klingmann decided to scrap the EPCM process and proceed with the construction of the Project with Klingmann at the helm being the "masters of our own house." (See, infra.) As to Employer directly hiring members of the trade unions, there is abundant evidence that Employer had already represented and warranted such in Section 1.5 of the PLA, which is totally consistent with both Rolow's and Simmons's testimony.

Graeme testified that he did not remember: attending any of the negotiations for the PLA (RT 42), being involved in the PLA negotiations (RT97), when the PLA negotiations took place, where they took place, who attended, or what was discussed. (RT 90)

B. THE PROJECT LABOR AGREEMENT

The PLA negotiated and signed by Golden Queen, provides

> 1.5. Primary Employer… represents and warrants that it is an employer in the building and construction industry because, at the commencement of construction and as of the date of executing this Agreement, it directly employs persons in the building and construction trades, will employ such persons on the Project and will continue to do so until completion of the commissioning of the Project.
>
> 2.1. A large labor pool represented by the Unions will be required to execute the work involved in the Project. Employers wish, and *it is the purpose of this Agreement,* to ensure that a sufficient supply of skilled craft workers are available at the Project, that all construction work and related work performed by the members of the Unions on this Project shall proceed continuously, without interruption, in a safe and efficient manner, economically with due consideration for the protection of labor standards, wages and working conditions.
>
> (emphasis added)
>
> 2.2. In furtherance of these purposes and to secure optimum productivity, harmonious relations between the parties and the orderly performance of the work, the parties to this Agreement agree to establish adequate and fair wage levels and working conditions and to protect the Project against strikes and lockouts and other interference with the process of the work.
>
> 4.1 The Employers recognize the Unions signatory to this Agreement as the sole and exclusive collective bargaining agents for their respective construction craft employees performing Covered Work for the Project….
>
> 4.2. All employees performing Covered Work shall be or become and then remain members in good standing of the appropriate Union as a condition of employment on or before the eighth (8th) day of employment, or the eighth (8th) day, following the execution of this Agreement, whichever is later.
>
> 5.1. The Primary Employer agrees that any contractor or subcontractor at any tier performing Covered Work on the Project shall be (i) signatory to this Agreement, and (ii) signatory to a multi-employer collective bargaining agreement with one or more of the Unions for the Soledad Mountain Project only.
>
> 6.1. All employees, including foremen and general foremen, covered by this Agreement shall be classified and paid wages and benefits in accordance with the then current collective bargaining agreement of the applicable Union.

6.2. This Agreement shall apply only to construction craft employees represented by Unions signatory to this Agreement.

7.1. During the life of this Agreement, the Unions, their agents, their representatives and their employees agree that they shall not incite, encourage, condone or participate in any strike, walkout, slowdown, sit-down, stay-in, boycott, sympathy strike, picketing or other work stoppage for any cause whatsoever with respect to this Project….

8.1. This Agreement is intended to provide close cooperation between management and labor. Each of the Unions will assign a representative to this Project for the purpose of completing the construction of the Project economically, efficiently, continuously, and without interruptions, delays, or work stoppages.

C. CONSTRUCTION OF THE SOLEDAD MOUNTAIN PROJECT

After the PLA was negotiated, Employer was unable to secure financing for the Project. In 2000 everyone was laid off and the Project was shelved. (RT 108) (GC 18)

By 2010, the Project was revived with Employer receiving final approvals to proceed in 2012. (RT 108) When construction for the Project began, as was stated by Employer's counsel Katy Raytis to John Spaulding at their meeting at the Bistro restaurant, Employer acted as its own Construction Manager. (RT 538)

1. The Contracting of Work for the Construction of the Project by Employer

Lutz Klingmann is the CEO of Employer and was charged with getting the Project built. He testified that he divided the construction of the Project into six to eight major components, (turnkey projects) and negotiated with contractors, on a fixed price contract, to perform the Project work. (RT 114) The ALJ found that Klingmann awarded 8 turnkey contracts for the construction of the Project: (1) the workshop warehouse (Gary Little Construction), (2) the assay laboratory (Gary Little Construction), (3) the earthworks required for building facilities (Guinn Corporation), (4) the stacking and conveying system (Terra Nova Technologies), (5) the electrical work (A-C Electric Company), (6) the crushing screening plant (Turnkey Processing Solutions),

(7) the Merrill-Crowe plant (Gary Little Construction), and (8) the contracts for procurement of materials for the Merrill-Crowe plant (Kappes Cassidy). (ALJD: 8: 12-20)

Klingmann also testified that the construction contract for the fuel storage facility awarded to Gary Little was also considered by Employer to be a turnkey project, notwithstanding that it was a $100,000-plus contract, whereas other contracts were in the multi-million dollar range. (RT 236-237) Employer entered into separate contracts with contractors for each of the turnkey projects. Klingmann testified that Employer entered into an additional construction contract to construct the guard shack. (RT 171, 172) (R 27)

In awarding some of the contracts for the performance of Project work, Employer used what was described as a "Master Services Agreement." As to Employer's use of master services agreements, such as the Guinn Corporation master services agreement (GC 14) and the A-C Electric master services agreement (GC 11), no scope of work is described to be awarded by Employer under those contracts, nor do those contracts give the contractors the exclusive right to perform any given scope of work. (RT 229-230) Paragraph 1.2 of the Guinn and A-C Electric MSAs provides that "This Agreement does not obligate Company to order services, materials or equipment nor does it obligate Contractor to accept services orders or any other orders …" As Klingmann testified about those contracts, "… every time that we had a separate element that had to be constructed, we got a cost estimate. We would approve the cost estimate, and it would then be covered with a notice to proceed, but under the master services agreement." (RT 228)

As to the work performed under Employer's master services agreements, such as with Guinn Corporation and A-C Electric, Employer could ask those contractors to perform additional scopes of work and ultimately, there would be anywhere from 15 to 50 different contracts

awarded by Golden Queen with those same two contractors. (RT 174) As set forth more fully below, that is exactly what happened.

Under the Guinn master services agreement, Employer issued approximately twenty (20) Notices to Proceed, each for a separate and distinct scope of work, or portion of the Project, to be performed by Guinn. (RT 199-200, 208, 298) Respondent entered into evidence thirteen (13) different notices to proceed issued by Employer. [4]/ This is in addition to the 15 "nuisance" projects which Employer awarded to Guinn after January 2013. (RT 300) As Klingmann described Guinn's capacity on the Project, "So Guinn was a really actively involved in the project *under our direct control and management* long before we actually decided to proceed with the project." (RT 300) (emphasis added)

Employer also removed certain scopes of work that it had awarded to one contractor and gave it to a different contractor. As reflected in Respondent's Exhibit 18, the Notice to Proceed to Guinn Construction for the Septic System, that scope of work was originally awarded and included in the turnkey project for the construction of the workshop warehouse which was to be performed by Gary Little Construction, Inc. (RT 223-224) Employer removed that contract and scope of work (R Ex. 18) from Gary Little and instead, awarded it to Guinn Construction. (RT 224)

2. <u>Employer's Further Involvement with the Construction of the Project</u>

Klingmann testified that Employer had a coordinating role on the Project as well as a quality assurance/quality control function over the turnkey projects (RT 129-130). Joe Balas is the Employer's manager of plant operations and is responsible for coordinating activities of the construction of the turnkey projects. (RT 352) His day-to-day activities include driving the job to

[4] See Respondent's Exhibits 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24, 26 and 28.

see how progress is going, answering questions from various contractors, discussing design changes with contractors, addressing jobsite issues as they come up, conducting weekly safety meetings, discussing with the contractors if they are on-track with their schedule and budget items and reviewing invoices to check if the work that is being billed for has actually been performed. (RT 368-72, 374)

Klingmann testified that Employer never purchased equipment or materials for the Project. (RT 132, 237-238) He later changed his testimony when he was shown Respondent's Exhibit 30, a proposal from AC Electric which provides in inclusions 8 and 10 that "installation of owner-furnished e-houses, medium voltage transformer, service entrance panel, and revenue metering unit" as well as "The installation of owner furnished rain shields at E-Houses." (RT 245-246) Employer also purchased a water well pump station for the Project, (R 31) (RT 246-247) a meter switch board for the water supply infrastructure (R 32) (RT 248) a motor control center for A-C Electric to install as part of their master services agreement, (RE 33) (RT 249) an electrical house for PW-1 (RE 34) (RT 250) as well as the high pressure grinding roll for the crushing and screening plant. (RT 183)

In meeting with the Unions, both before construction on the Project started, as well during as discussions that took place in an attempt to settle the Council's grievance, infra, Klingmann never told the Unions that Employer had changed its mode of constructing the Project, by not acting as its own general contractor (RT 159) or that Employer would not be directly hiring any employees. (RT 531) To the contrary, in or about July, 2009, Klingmann met with Mike Rock and Steve Gomez, representatives of the Plumbers and Pipefitters Union, and asked about the availability of union workers for hire and their wage rates. (RT 492-93). At no

time, however, did Klingmann tell either Rock or Gomez that Employer would not be directly hiring employees to work on the Project. (RT 497, 507)

D. THE COUNCIL'S GRIEVANCE

John Spaulding is the Executive Secretary of the Council. When he became aware of Employer commencing construction work at the Project, he sent a letter (GC 16) to Employer requesting information. When he did not get a response, he sent a grievance letter (GC 17) to Employer to meet and discuss his concerns.

By e-mail dated September 20, 2013, Katy Raytis, counsel for Employer, sent a response to the grievance prepared by Klingmann, to the Council's attorney, Ray Van der Nat. This response advised that it was the Employer's position that the PLA had lapsed and that Employer proposed to begin negotiations for a new Project Labor Agreement to cover the largest construction portion of the Project, namely, the crushing and screening plant. (GC 18) Thereafter, Raytis, Klingmann, Spaulding and Van der Nat met on several occasions to attempt to negotiate a settlement to the Council's grievance.

At the first step grievance meeting held at the Bistro restaurant on or about September 20, 2013, Raytis, Spaulding and Van der Nat discussed the grievance. Raytis informed Spaulding and Van der Nat that it was the Employers position that the PLA was null and void, discussed different facets of the Project yet to be worked-out, that Employer was acting as its own Construction Manager and reiterated what Klingmann had set forth in his grievance response letter (GC 18). (RT 522, 538)

The ALJ did not credit the testimony of Spaulding wherein Spaulding testified that the Employer's counsel, Katy Raytis, told him that Klingmann acted as the Employer's construction manager due to his earlier testimony that he believed the Employer hired no employees for the

Soledad Project but used only general contractors and subcontractors and given Klingmann's total lack of expertise in construction. Yet that is exactly what Employer did when Klingmann decided to scrap the EPCM process and proceed with the construction of the Project with Klingmann at the helm being the "masters of our own house." (See, infra.)

Approximately thirty (30) days later Raytis, Spaulding, Van der Nat, Klingmann and others met again in an attempt to settle the grievance. (RT 524) The parties discussed Klingmann's offer, as set forth in his previous grievance response letter to Spaulding (GC 18) to have the conveyor crushing and stacking system to be built under the terms and conditions of a PLA as a settlement of Respondent's grievance. (RT 525) The parties met a third time at Raytis's office and basically discussed the same matters as were discussed at the prior meeting. At the conclusion of this meeting, Spaulding asked that Employer put in writing their offer to settle the grievance so that Spaulding could take the offer to his affiliated unions for consideration. (RT 528) Thereafter, Raytis forwarded Employer's settlement proposal to Van der Nat (GC 19).

Employer's written settlement proposal to the Council (GC 19) provided that Employer would require that the construction of the Crushing-Screening Plant would be performed by "unionized workers" in exchange for the Council agreeing that the 1997 PLA (GC 3) was null and void. In testifying about this written offer, Klingmann stated that he discussed with Turnkey Processing Solutions, Inc. (TPS), the turnkey contractor that was to perform the construction of the Crushing-Screening Plant, that the work would be performed on a Union Wage basis. This basis would apply not only to TPS, but also, all of its subcontractors. (RT 221) When asked if the discussion with TPS also included a requirement that TPS would also be required to use union workers, Klingmann stated:

> "Q. And did you have any discussion with TPS about, well, you're also going to be required to go ahead and use Union workers on the project?

"A. No. Union wage rates is what we had it out for."
"Q. And was that the proposal you made to the Building Trades Council that Golden Queen would provide that Union wages would be paid on that project and nothing else?
"A. We did make a specific proposal to you, which was not accepted. Had that proposal been accepted, then *I would have handed this to TPS and said, this is the basis on which we have to proceed*. But that never happened." (RT 221, lines 22-25, 222, lines 1-7) (emphasis added)

Thereafter, the parties had a telephone conference in March 2014. (RT 529) Spaulding notified Klingmann that the Employer's settlement proposal was rejected and that the Council would submit a counteroffer to Employer. On or about March 27, 2014, Van der Nat submitted a counter proposal to Employer to resolve the Council's grievance (GC 22). (RT 531) This proposal offered non-union contractors working on the Project to be able to use their core employees that were crucial to the contractor's crew to be used on the Project. These core employees, however, would still be required to go to the appropriate union hiring hall, become members of the appropriate union and then get dispatched back to the employing contractor. (RT 347) Employer ultimately rejected the Council's counter proposal and no further discussions ensued.

III

GOLDEN QUEEN IS AN EMPLOYER IN THE CONSTRUCTION INDUSTRY WITHIN THE MEANING OF THE PROVISO TO SECTION 8(e) OF THE ACT

In the Board's *Indeck* decision, *Glens Falls Building and Construction Trades Council*, 350 NLRB 417 (2007), discussed more fully below, the Board reaffirmed that an employer can be in the construction industry for a particular construction project even if it is not primarily engaged in the construction business, citing *Carpenters Local 743 (Longs Drug)*, 278 NLRB 440 (1986).

In *Carpenters Local 743*, supra, in affirming the Administrative Law Judge's rulings, findings and conclusions, the Board held that

> "… whether an employer not primarily in the construction business may be deemed to be an employer in the construction industry for purposes of the first proviso to Section 8(e) is dependent on the degree of control over the construction site labor relations it elects to retain. As its own general contractor, an employer retains absolute control.
>
> "Similarly, in situations where an employer hires a general contractor but nonetheless regularly makes decisions, including the selection of subcontractors, normally within the scope of a general contractor's duties and authority, it would appear that the employer retaining such authority is tantamount to a general contractor."

In *Los Angeles Building and Construction Trades Council (Church's Fried Chicken)*, 183 NLRB 1032 (1970) the employer, a fast food restaurant, employed a construction superintendent to oversee the construction of its new restaurant, rather than using a general contractor. The superintendent hires the subcontractors, oversees their performance, approves their bills which he sends to the main office for payment, and disburses payments to them. In adopting the Trial Examiner's decision in that case, the Board held that the employer was engaged in the construction industry because it acted as its own general contractor in the construction of its own retail stores and thereby necessarily retained control over its subcontractor's labor relations.

From the beginning of this case when Employer met with the Council and its affiliated unions and negotiated its PLA, to the end, when Employer met with the Council in an attempt to settle the grievance that the Council had filed over Employer's failure to comply with the provisions of the PLA, Employer's involvement in the construction of the Project shows each of the following.

A. GOLDEN QUEEN HAD TOTAL CONTROL OVER THE LABOR RELATIONS OF THE CONTRACTORS THAT IT HIRED TO CONSTRUCT THE PROJECT

After finding that "the Employer retained control of which work to award under the various contracts…." (ALJD 11), the ALJ then went on to find that "There is not a scintilla of

evidence that the Employer retained control over the labor relations of the turnkey contractors or their subcontractors by supervising them, selecting the subs or directing their work in any way." (ALJD 14) Respondent submits that the ALJ missed the mark. To the contrary, the evidence overwhelmingly shows that Employer had total control over the labor relations of the contractors and subcontractors that Golden Queen awarded Project Work to on its Project.

1. The PLA

Article 5 of the PLA is entitled: Subcontracting. It provides that

> 5.1 The Primary Employer [Golden Queen] agrees that any contractor or subcontractor at any tier performing Covered Work on the Project shall be (i) signatory to this Agreement, and (ii) signatory to a multi-employer collective bargaining agreement with one or more of the Unions for the Soledad Mountain Project.
>
> 5.2 Nothing in this Agreement shall in any manner whatsoever limit the rights of the Primary Employer, or any other Employer, to subcontract work or to select its contractors or subcontractors, provided, however, that all Employers, contractors, or subcontractors, at all tiers, performing Covered Work shall be required to comply with the provisions of this Agreement. Employer shall notify each of its contractors and subcontractors of the provisions of this Agreement and require as a condition precedent to the award of any construction contractor or subcontract for Covered Work, that all such contractors and subcontractors at all tiers become signatory to this Agreement. Employers shall become signatory to this Agreement by signing an Employer Agreement to be Bound, which is provided as Attachment A to this Agreement.

The language of the PLA, itself, evidences that Golden Queen had complete authority over the labor relations of its contractors and subcontractors, at all tiers. Golden Queen exercised that authority when it signed the PLA which required that all contractors and subcontractors sign the PLA and sign the multi-employer collective bargaining agreement with one or more of the Unions signed to the PLA.

In signing the PLA, each contractor and subcontractor would, thus, be obligated to (i) use the hiring hall of the applicable Union, as the exclusive source of all craft employee for covered work on the Project (PLA, Section 4.3), (ii) comply with the Union Security clause (PLA,

Section 4.2), and (iii) pay the wages and [fringe] benefits in accordance with the then current collective bargaining agreement of the applicable Union (PLA, Section 6.1).

Further, Graeme, Golden Queen's vice president in charge of Golden Queen's operations at the Project and Golden Queen's representative who negotiated and signed the PLA on Golden Queen's behalf, testified that he had the authority to require contractors performing Project work to sign the PLA or otherwise not be awarded Project work if they failed to do so. (RT 96-7)

This evidence clearly establishes that Golden Queen retained the absolute authority and control over the contractor's and subcontractor's labor relations for work they performed on Golden Queen's Project.

2. <u>Golden Queen's Offer for a New PLA to Cover the Crushing-Screening Plant</u>

That Golden Queen retained the absolute authority and control over the contractor's and subcontractor's labor relations for work they performed on Golden Queen's Project is further evidenced by its offer to settle the grievance filed by the Council.

In response to the grievance filed by the Council against Golden Queen for its alleged violation of the PLA after construction on the Project had started, Klingmann notified the Council that it was the Employer's position that the PLA had lapsed, but, Klingmann proposed to begin negotiations for a new Project Labor Agreement to cover the largest construction portion of the Project, namely, the Crushing-Screening Plant. (GC 18) Thereafter, Raytis, Klingmann, Spaulding and Van der Nat met on several occasions to attempt to negotiate a new PLA to cover the Crushing-Screening Plant.

After several meetings where the parties attempted to reach an agreement, Spaulding asked that Employer put in writing, Employer's offer to settle the grievance for a new PLA. (RT 528) Thereafter, Raytis forwarded Employer's settlement proposal to Van der Nat (GC 19).

Employer's settlement proposal to the Council (GC 19) provided that Employer would require that the construction of the Crushing-Screening Plant would be performed by "unionized workers" in exchange for the Council agreeing that the 1997 PLA was null and void. This "unionized workers" requirement applied not only to TPS's own employees, but also to the employees of all of the subcontractors hired by TPS.

Klingmann testified about his discussions with TPS, the contractor that was chosen by Klingmann to build and construct the Crushing-Screening Plant. As he testified, had the Council accepted Employer's written proposal to negotiate a new PLA which would require that the construction of the Crushing-Screening Plant would be performed by "unionized workers" (GC 19),

"I would have handed this [the newly negotiated PLA] to TPS and said, this is the basis on which we have to proceed." [5]/

This basis would apply not only to TPS, but also, all of its subcontractors. (RT 221)

Just as when the 1997 PLA was negotiated, Golden Queen had the authority and control as to what basis, union or non-union, the work would be performed by TPS and its subcontractors, on Employer's Crushing-Screening Plant.

Contrary to his finding that "There is not a scintilla of evidence that the Employer retained control over the labor relations of the turnkey contractors or their subcontractors" the facts clearly establish that Employer had the ability to say to TPS, this is the basis on which we will proceed, take it or leave it. Had TPS taken this offer, it would have had to perform its work on the Project with unionized workers, had TPS left it, they would not have been awarded the

[5] Regardless if the requirement was the use of union workers, as was the Employer's written offer as reflected in GC 19 or union wage rates, as Klingmann mistakenly testified too, these requirements imposed not only on TPS, but also all of its subcontractors, clearly show that Golden Queen had control of what the labor relations would be for the workers performing this scope of work to be performed on the Project.

contract to build the crushing-screening plant. This take it or leave it offer clearly evidences that Employer had the ultimate control and authority as to what its contractors and subcontractors labor relations would be in the performance of jobsite work on Employer's Project.

There is ample evidence to support the conclusion that Employer had absolute control over the labor relations of its contractors performing Project work on the Soledad Mountain Project.

B. GOLDEN QUEEN ACTED AS ITS OWN GENERAL CONTRACTOR/CONSTRUCTION MANAGER FOR ALL PROJECT CONSTRUCTION WORK TO BE PERFORMED ON THE SOLEDAD MOUNTAIN PROJECT

1. Employer Awarded its Own Contracts to the Contractors Performing Project Work

Employer controlled the letting out of contracts for the performance of Project work. At the hearing, Klingmann testified that, rather than using an Engineering Procurement and Construction Management agreement (EPCM) as Employer had purportedly originally intended to use back in 1997, he divided the construction of the Project into six to eight major components (turnkey projects) that he negotiated with contractors on a fixed price basis in the awarding of those contracts, and that he awarded contracts to the respective contractors for each of these Project components. The ALJ found that Klingmann awarded 8 turnkey contracts for the construction of the Project: (1) the workshop warehouse (Gary Little Construction), (2) the assay laboratory (Gary Little Construction), (3) the earthworks required for building facilities (Guinn Corporation), (4) the stacking and conveying system (Terra Nova Technologies), (5) the electrical work (A-C Electric Company), (6) the crushing screening plant

(Turnkey Processing Solutions), (7) the Merrill-Crowe plant (Gary Little Construction), and (8) the contracts for procurement of materials for the Merrill-Crowe plant (Kappes Cassidy).

In addition to the 8 turnkey contracts described by the ALJ, Klingmann also testified that the construction contract for the fuel storage facility awarded to Gary Little was also considered by Employer to be a turnkey project, notwithstanding that it was a $100,000-plus contract, whereas other contracts were in the multi-million dollar range. (RT 236-237). Klingmann further testified that Employer entered into an additional construction contract to construct the guard shack. (RT 171, 172) Employer also entered into a contract for the Phase 1/1A Waterline with Guinn construction. (R Ex. 22)

Thus, the record evidence disclosures that Employer entered into no less than eleven (11) independent contracts for the construction of the Project.

In awarding some of the contracts for the performance of Project work, Employer used what Klingmann described as a "Master Services Agreement." As to Employer's use of Master Services Agreements (hereinafter "MSA"), such as the Guinn Corporation MSA (GC 14) and the A-C Electric MSA (GC 11), no scope of work is described to be awarded by Employer under those contracts, nor do those contracts give the contractors the exclusive right to perform any given scope of work. (RT 229-230) Paragraph 1.2 of the Guinn and A-C Electric MSAs provides that "This Agreement does not obligate Company to order services, materials or equipment nor does it obligate Contractor to accept services orders or any other orders …" As Klingmann testified about those contracts, "… every time that we had a separate element that had to be constructed, we got a cost estimate. We would approve the cost estimate, and it would then be covered with a notice to proceed, but under the master services agreement." (RT 228)

As to the work performed under Employer's MSAs, such as with Guinn Corporation and A-C Electric, Employer could ask those contractors to perform additional scopes of work and ultimately, there would be anywhere from 15 to 50 different contracts awarded by Golden Queen with those same two contractors. (RT 174) As set forth more fully below, that is exactly what happened.

Under the Guinn MSA, Employer issued approximately twenty (20) "Notices to Proceed," each for a separate and distinct scope of work, or portion of the Project, to be performed by Guinn. (RT 199-200, 208, 298) Respondent entered into evidence thirteen (13) different notices to proceed issued by Employer.[6]/ This is in addition to the 15 "nuisance" projects which Employer awarded to Guinn after January 2013. (RT 300) As Klingmann described Guinn's capacity on the Project, "So Guinn was a really actively involved in the project *under our direct control and management* long before we actually decided to proceed with the project." (RT 300) (emphasis added)

Employer also removed certain scopes of work that it had awarded to one contractor and gave it to a different contractor. As reflected in Respondent's Exhibit 18, the Notice to Proceed to Guinn Construction for the Septic System, that scope of work was originally awarded and included in the turnkey project for the construction of the workshop warehouse which was to be performed by Gary Little Construction, Inc. (RT 223-224) Employer subsequently removed that contract and scope of work (R Ex. 18) from Gary Little and instead, awarded it to Guinn Construction. (RT 224).

Thus, rather than contracting with a single general contractor or an EPCM contractor who would be responsible for the construction of the entire project and the awarding of various construction contracts needed to complete the project, Golden Queen remained responsible for

[6] See Respondent's Exhibits 12, 13, 14, 15, 16, 18, 19, 20, 21, 23, 24, 26 and 28.

and retained and exercised the right to award its own contracts for the work to be performed in completing the Project Work.

Just as a general contractor would contract with subcontractors to perform specialty work, Employer contracted with specialty contractor to perform specialty work within their own expertise, i.e. the construction of buildings, earthworks, stacking and conveying, electrical work, crushing and screening plant, material procurement, etc.

2. <u>Employer's Further Involvement with the Construction of the Project</u>

Klingmann testified that Employer had a coordinating role on the Project as well as a quality assurance/quality control function over the turnkey projects (RT 129-130). Further, Klingmann's role was making sure that engineering is complete, obtaining all the approvals and permits, doing cost estimates for the contracts and the negotiation of the turnkey projects. (RT 137) Employer's manager of plant operations, Joe Balas's, day-to-day activities include driving the job to see how progress is going, answering questions from various contractors, discussing design changes with contractors, addressing jobsite issues as they come up, conducting weekly safety meetings, discussing with the contractors if they are on-track with their schedule and budget items and reviewing invoices to check if the work that is being billed for has actually been performed. (RT 368-72, 374)

Klingmann testified that, as the President of Golden Queen, "I was directly involved in the management of the company and that included overseeing all of the engineering, all of the additional environmental review work we did. I worked directly on all the approvals and permits." (RT 111-12) Further, "[W]e are responsible for all of the engineering. We control all of the engineering. We subcontract a lot of the engineering to independent contractors so we control

the engineering. Based on my personal experience, we think that we are the masters of our own house if we control the engineering." (RT 224)

Klingmann testified that Employer never purchased equipment or materials for the Project (RT 132, 237-238), but that ended up not being true. As the documentary evidence established, Employer purchased e-houses, a medium voltage transformer, service entrance panel, a revenue metering unit as well as rain shields at E-Houses for AC-Electric to install." (RT 245-246) Employer also purchased a water well pump station for the Project, (R 31) (RT 246-247) a meter switch board for the water supply infrastructure (R 32) (RT 248) a motor control center for A-C Electric to install as part of their master services agreement, (RE 33) (RT 249) an electrical house for PW-1 (RE 34) (RT 250) as well as the high pressure grinding roll for the crushing and screening plant. (RT 183)

In meeting with the Unions, both before construction on the Project started, as well during as discussions that took place in an attempt to settle the Council's grievance, Klingmann never told the Unions that Employer had changed its mode of constructing the Project, by not acting as its own general contractor, (RT 159) or that Employer would not be directly hiring any employees. (RT 531) To the contrary, in or about July, 2009, Klingmann met with Mike Rock and Steve Gomez, representatives of the Plumbers and Pipefitters Union, and asked about the availability of union workers for hire and their wage rates. (RT 492-93). At no time, however, did Klingmann tell either Rock or Gomez that Employer would not be directly hiring employees to work on the Project. (RT 497, 507)

3. Employer Assumed the Overall Construction Risk on the Project

Employer assumed the construction risk of not getting a fully integrated, complete Project through its own coordination and selection of contractors performing jobsite work rather than hiring

a single general contractor which would be responsible for the entire project, as opposed to individual segments thereof and the possibility that the project would not be completed on time or within budget.

As confirmed by Employer's counsel, Katy Raytis, and the criteria set forth immediately above in this section, Employer acted as its own construction manager and/or general contractor on the Project and was, thus, an employer in the construction industry within the meaning of the proviso to section 8(e) of the Act . See: *Carpenters Local 743,* supra; *See Church's Fried Chicken, Inc.,* supra; *see also A.L. Adams Construction Co. v. Georgia Power Co., 733* F.2d 853 (11th Cir. 1984), *cert. denied, 471* U.S. 1075 (1985) (owner that acted as a construction manager was an employer in the construction industry); *Los Angeles Building and Construction Trades Council (Donald Schriver, Inc.),* 239 *NLRB* 264, 264, 265 (1978), *enfd, 635* F.2d 859 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 976 (1981) (proviso protects contracting agreement with employer described by the Board as "builder-developer and general contractor" and as "owner-builder").

In *Church's Fried Chicken*, supra, Church's was engaged in the business of operating a chain of retail drive-in, take-out stores featuring fried chicken and other prepared foods.
In the construction of its new stores, instead of using a general contractor, one of its employees acted as the superintendent of the construction and engages various specialty contractors to perform substantially all of the construction work.

Since June 1969, Durel Tucker was employed by Church's as its construction superintendent in Southern California. Tucker hires the subcontractors, oversees their performance, approves their bills which he sends to the main office for payment, and disburses payments to them.

Church's builds stores for its own use and neither solicits nor performs construction for others. Church's, instead of employing a general contractor, acted as its own prime contractor through Tucker, its construction superintendent.

Thus, the Board considered the fact that Church's, instead of using a general contractor, builds its own stores using one of its employees to superintend the construction, hires the contractors to perform the construction work needed, oversees the contractor's performance of their work, and approves and submits bills for payment. Based on these facts, the Board found that Church's was an employer in the construction industry within the meaning of Section 8(e) of the Act.

In the case at bar, there is no dispute that Golden Queen selects the contractors which they will use and hires those contractors. Employer's manager of plant operations, Joe Balas, coordinates the construction activities of those contractors, discusses design changes with contractors, addresses jobsite issues as they come up, conducts weekly safety meetings, discusses with the contractors if they are on-track with their schedule and budget items and reviews invoices to check if the work that is being billed for has actually been performed. Employer also performs a quality assurance/quality control function over the turnkey projects. Klingmann was directly involved in overseeing all of the engineering and all of the additional environmental review work. Employer purchased materials for the various contractors to install in the performance of those contractor's respective scope of work. This is in addition to the absolute control over the labor relations of its contractors.

Although the size of the Project is much larger than a drive-in, take out store, Golden Queen engaged in the exact same activities for the construction of its Project which were

engaged in by Church's and much, much more. Golden Queen should, similarly, be found to be an employer in the construction industry within the meaning of Section 8(e) of the Act.

IV

THE PLA WAS ENTERED INTO IN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP

A. GOLDEN QUEEN SHOULD BE ESTOPPED FROM DENYING THAT IT DID NOT HIRE EMPLOYEES TO PERFORM PROJECT WORK

From the beginning, when Richard Graeme sat down to negotiate the PLA with the Unions, he told the Unions that Golden Queen was going to directly hire employees to perform construction work on the Project. This is confirmed in the language of the PLA itself.

Section 1.5 of the PLA provides that 1.5.

> Primary Employer… represents and warrants that it is an employer in the building and construction industry … directly employs persons in the building and construction trades, will employ such persons on the Project and will continue to do so until completion of the commissioning of the Project.

Neither Jim Good, Golden Queen's attorney, nor Graeme never struck this language from any of the drafts exchanged between the negotiating parties. To the contrary, Graeme received the final draft of the PLA from Good, with the language contained in section 1.5 and signed the PLA.

At no time did Klingmann ever tell any of the Union representatives that he met with, that Golden Queen would not hire any employees to perform job-site work. To the contrary, Klingmann met with representatives of the of the Plumbers and Pipefitters Union, asked about the availability of Union workers and what their wage rates were under their collective bargaining agreement.

In *Alpha Associates (Unite)*, 344 NLRB 782 (2005), the Board stated: the principle of equitable estoppel is premised on the notion that a party that obtains a benefit by engaging in conduct that causes a second party to rely on "the truth of certain facts" should not be permitted to later controvert those facts to the prejudice of the second party. See *R.P.C., Inc.*, 311 NLRB 232 (1993). The Board has identified the requisite elements of estoppel as (1) knowledge; (2) intent; (3) mistaken belief; and (4) detrimental reliance. See *Red Coats*, 328 NLRB 205, 206 (1999); *R.P.C.*, supra at 233. In addition, in light of the underlying premise of the estoppel doctrine, the Board also assesses whether the party to be estopped has received a benefit as the result of its actions. See *Red Coats*, supra at 207; *R.P.C.*, supra at 233. In Accord: *Verizon Information Services (CWA)*, 335 NLRB 558 (2001).

All of those elements are present here. The record evidence in this case shows that (1) Graeme and Klingmann knew that Golden Queen was not going to hire any construction employees to perform job-site work. (2) Notwithstanding, Graeme and Klingmann intended on the Unions believing that they would, saying as much both verbally and in writing. (3) The Unions believed that Employer was going to directly hire employees, based on their conversations and on the verbiage of the PLA itself. (4) Employer, when it wanted to renege on its obligations as set forth in the PLA, raised the fact that they had no employees and now argue that the PLA was not entered into in a collective bargaining context. (5) Golden Queen now seeks to benefit, by the Board declaring its PLA to be unenforceable, from the fraud they perpetrated on the Unions.

The ALJ rejected this estoppel argument finding "insufficient evidence to establish that the PLA was entered into by the parties with the mutual understanding that the Employer would act as its own general contractor or hire only union contractors. While this may have been the

intent of Respondent, the evidence reflects that at all times the Employer planned to hire either an ECPM contractor or turnkey contractors." (ALJD 16: 26-36) To the contrary, not only did Graeme tell the Unions that Employer would do so, the PLA itself provides in Section 5.1 that Employer would hire only union contractors. The fact remains that Employer represented to the Unions that Employer intended to hire their union members which, according to Employer's witnesses at the hearing, was patently false.

Golden Queen should be estopped from asserting that its PLA was illegal due to the fact that it did not hire any construction employees to perform work on the Project.

B. THE *INDECK* DECISION

Indeck designed, owned and operated power facilities in the New York area. It did not employ workers in the building and construction trades. Various construction unions along with the Glens Falls Building and Construction Trades Council had discussions with Indeck regarding the construction of Indeck's Corinth power plant project. In February 1992, Indeck wrote to the unions and assured them of Indeck's commitment and good faith intentions that Indeck would instruct its contractor to execute an agreement with the unions to construct the Corinth project. Thereafter, Indeck contracted with Sirrine to build the Corinth power plant. Sirrine and the unions reached an agreement that the contractors and subcontractors performing jobsite work would sign a PLA for the Corinth project. The PLA for the Corinth project was attached to the Sirrine/union agreement. The PLA was signed by the unions and the contractors, but not by Indeck or Sirrine. It was understood that neither Sirrine nor Indeck would be employing any building and construction trades workers on the project.

A dispute arose between Sirrine and Indeck resulting in Sirrine's contract being cancelled and being removed from the job and replaced by CNF Constructors. Indeck did not require CNF to

require its contractors sign the PLA. The unions sued Indeck to enforce its agreements. Indeck ultimately filed an 8(e) charge against the unions, which stayed the lawsuit, alleging that its February 1992 letter was unenforceable and void. The unions contended that the agreement was protected by the proviso to section 8(e) because (1) Indeck is an employer in the construction industry within the scope of the proviso, and (2) the agreements were negotiated within a collective bargaining context *or* (3) the agreements were specifically negotiated and executed to resolve the problems involved in permitting union and nonunion employees to work side by side at a common construction site. (*Indeck* at 421)

The Board first reaffirmed that an employer can be in the construction industry for a particular construction project even if it is not primarily engaged in the construction business, with both ALJs having found Indeck to be a construction industry employer within the meaning of the proviso for the Corinth project. The Board, however, concluded that it need not decide this issue since the unions failed to prove either the second or third prongs of their defense, namely, that the agreements were negotiated within a collective bargaining context *or* that the agreements were specifically negotiated and executed to resolve the problems involved in permitting union and nonunion employees to work side by side at a common construction site.

Relying on the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), the Board found that the proviso to section 8(e) "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* [7]/ problem, possibly to common situs relationships on particular jobsites as well."

[7] *National Labor Relations Board v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951)

As to the unions' defense that the agreements arose in the context of a collective bargaining relationship, the Board then held that neither Indeck's February 20 letter agreement with the Respondents nor the Respondents' subsequent agreement with Sirrine arose in the context of a present or pre-hire collective-bargaining relationship. While the Respondents claim an intent to represent Indeck's employees, the record clearly shows that at all relevant times the parties involved understood that Indeck had no employees in the building and construction trades and that Indeck and Sirrine would not employ anyone in those trades on the Corinth co-gen jobsite. Nothing in either agreement purported to relate to terms and conditions of employment for any Indeck or Sirrine employees. The sole purpose of those agreements was to bind Indeck to select a contractor who, in turn, would subcontract work only to employers who signed the Corinth PLA. Indeck and Sirrine were not themselves signatory to the PLA. Accordingly, the Board found that the Respondents have failed to prove that the challenged agreements and the lawsuit to enforce them are entitled to protection under the 8(e) proviso based on the collective-bargaining relationship prong of the *Connell* test. (*Indeck* at 421)

As to the unions' defense that the agreements were specifically negotiated and executed to resolve the problems involved in permitting union and nonunion employees to work side by side at a common construction site, the Board held that it has yet to determine whether an alternative basis for proviso coverage exists under this *Connell* common-situs dictum, and declined to do so in that case. Notwithstanding, the Board went on to state that the Respondents have failed to prove that the Indeck letter agreement and the resultant agreement with Sirrine were executed for the purpose of avoiding tensions that might arise if union and nonunion workers of different employers were to work side by side on the Corinth co-gen site. Nor do they establish any other valid purpose cognizable under the proviso. On the contrary, the record

shows that Indeck's purpose was to remove the threat of union opposition to Indeck's efforts to secure regulatory approval of its co-gen construction plans, and secondarily, to provide a steady labor source for jobsite subcontractors.

The Board, accordingly, found the unions to have violated section 8(e) as alleged.

The Board has consistently found that, where a union-signatory contracting clause is part of a collective bargaining agreement, the clause is protected by the proviso even if the employer does not directly employ any employees. *Operating Engineers Local No. 12 (Vandenberg Development Corp.)*, 131 NLRB 520, 522 (1961); *Orange Belt District Council of Painters No. 48 (Mahoney Specialties, Inc.)*, 276 NLRB 1372 (1985); *Milwaukee & Southeast Wisconsin District Council of Carpenters (Rowley-Schlimgen, Inc.)*, 318 NLRB 714, 714 and n.2 (1995); *International Assn of Bridge Structural and Ornamental Ironworkers (Southwestern Materials & Supply, Inc.)*, 328 NLRB No. 142. In *Mahoney Specialties*, the Board adopted the opinion of the Administrative Law Judge, in which he rejected the notion that the proviso's protection extends only to an employer with its own employees on the job site. In that case, the union and employer had a collective bargaining agreement with a union-signatory contracting clause. The employer argued that, since it had subcontracted its responsibilities completely and had no employees on the job site, its agreement was not protected by the proviso. This assertion, the ALJ concluded, would unjustly allow the contractor unilaterally to escape the proviso by simply subcontracting its work. 276 NLRB at 1389.

The same rationale applies here. If, as Golden Queen asserts, an agreement must be in the context of a collective bargaining relationship to fall within the proviso, and it is impossible to enter into an §8(f) agreement if the employer does not intend to employ any craft workers, an employer could, as the ALJ observed in *Mahoney Specialties*, avoid the proviso by unilaterally

contracting out all of its work, and making clear to the union that it intended to contract out all of its work. A construction industry employer would thereby be able to void its contracting agreements.

Golden Queen's argument in this regard erroneously focuses on whether it hires employees to perform construction work rather than on whether it contracts construction work to others. Thus, the important question with regard to Golden Queen should not be whether that employer hires construction workers, but whether it controls labor relations on the site, and is therefore, the appropriate party with whom a union can enter into a contracting agreement contemplated by the proviso. Any other conclusion would result in the absurd situation present in the instant case.

Clearly, Golden Queen was the party that could give the Unions the union-signatory contracting protection common in the construction industry, and the Unions sought such protection from Golden Queen after having represented and warranting that it is an employer in the building and construction industry because, at the commencement of construction and as of the date of executing the PLA, it directly employs persons in the building and construction trades, will employ such persons on the Project and will continue to do so until completion of the commissioning of the Project.

Yet, according to Golden Queen, although it gave the Unions this protection, it was entitled to renege on its agreement because it never directly hired any of the workers that the unions sought to represent. As set forth below, Congress did not contemplate such a result when it drafted the proviso. Because the PLA falls within the plain language of the proviso, and is fully consistent with its purposes, the PLA was valid under the Act, and Golden Queen must face the consequences of breaching that agreement.

C. THE FACTS IN THIS CASE ARE SIGNIFICANTLY DIFFERENT FROM THOSE IN *INDECK* WARRANTING A DIFFERENT OUTCOME

The facts in this case are significantly different from those relied upon by the Board to come up with the conclusions which it reached in its *Indeck* decision.

- Unlike Indeck, Golden Queen negotiated and signed the Project Labor Agreement negotiated for the Project.
- Unlike Indeck, Golden Queen expressly represented and warranted, in the PLA, that it directly employs persons in the building and construction trades, and that it will employ such persons on the project and will continue to do so until the commissioning of the Project. Golden Queen also told representatives of the Unions, at the negotiations which resulted in the PLA being reached, that it would be directly hiring carpenters, electricians and other building trades' craftsmen.
- Unlike Indeck, Golden Queen recognized the Unions as the sole and exclusive collective bargaining agents for its respective construction craft employees performing covered work on the Project that Golden Queen said it would be hiring.
- Unlike Indeck, Golden Queen expressly represented and warranted that it is an employer in the building and construction industry.
- Unlike with Indeck, where the Board found the sole purpose of those agreements was to bind Indeck to select a contractor who, in turn, would subcontract work only to employers who signed the Corinth PLA, here the stated purposes of the PLA were, to ensure that a sufficient supply of skilled craft workers are available at the Project, that all construction work and related work performed by the members of the Unions on this Project shall proceed continuously, without interruption, in a safe and efficient

manner, economically with due consideration for the protection of labor standards, wages and working conditions (PLA, ¶ 2.1) as well as to secure optimum productivity, harmonious relations between the parties and the orderly performance of the work, the parties to the Agreement agreed to establish adequate and fair wage levels and working conditions and to protect the Project against strikes and lockouts and other interference with the process of the work. (PLA, ¶ 2.2)

- Unlike with Indeck, where the Board found the sole purpose of those agreements was to bind Indeck to select a contractor who, in turn, would subcontract work only to employers who signed the Corinth PLA, here the PLA set forth wages, hours and working conditions that would be afforded to all employees working on the Project, including Golden Queen's own employees.

As set forth more fully above, the PLA, as it exists, sets forth all of the terms and conditions that are routinely provided for in industry wide collectively bargained for project labor agreement. There are no allegations in the complaint that the PLA is anything other than a valid collective bargaining agreement authorized under section 8(f).

The factual differences set forth above, along with the fact that the PLA sets forth a full collective bargaining agreement differentiates this case from *Indeck* and warrants dismissal of the complaint.

D. THE PLA FALLS WITHIN THE PROTECTION OF THE PLAIN MEANING OF THE PROVISO TO SECTION 8(e)

Assuming, arguendo, that the PLA between the Employer and the Unions was not negotiated in the context of a collective bargaining relationship, the agreement is nonetheless

protected by the construction industry proviso because the agreement is fully consistent with the purposes of the proviso.

As stated above, in *Connell*, the Supreme Court stated that the protections of the construction industry proviso extend "to agreements in the context of collective bargaining relationships and possibly . . . to common-situs relationships on particular jobsites as well." 421 U.S. at 633. Thus, the Court suggested "that secondary union-signatory subcontracting clauses might be protected by the proviso even without a collective-bargaining relationship if they were directed toward the reduction of friction that may be caused when union and non-union employees of different employers are required to work together on the same jobsite." *Indeck*, 350 NLRB at 421. Even if it is assumed for the sake of argument that the PLA here was not negotiated in the context of a collective bargaining relationship, as set forth below, it unquestionably addresses and reduces the problems created by common-situs relationships on particular construction projects.

VI

THE SOLEDAD MOUNTAIN PLA IS CONSISTENT WITH THE PURPOSES OF THE PROVISO AND ADDRESSES COMMON SITUS RELATIONSHIPS ON A PARTICULAR JOBSITE

The PLA in the instant case is fully consistent with the intent of the proviso and addresses common situs problems. First, the agreement was one to build the entire project with all union labor from all of the various trades, not just plumbing and steam fitting work, the work of one trade, as was the case in *Connell*. In *Building and Construction Trades Council of the Metropolitan District v. Massachusetts Water Resources Authority*, 507 U.S. 218, 232 (1993), the Supreme Court recognized that a project-wide agreement served "legitimate" purposes. In

making this statement, the Court cited to its decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 662, and n. 14 (1982). That portion of *Woelke &Romero* sets forth the legitimate role union-signatory contracting agreements play in reducing jobsite friction and ameliorating the effects of *Denver Building Trades.* As a multi-craft agreement, the agreement here -- unlike the agreement in *Connell* -- protected union employees from working alongside nonunion workers, thus reducing jobsite friction, and promoting labor peace. *See Landscape Specialties v. Laborers, Local 806, 477 F. Supp.*17, 22 (C.D. Calif. 1979) (an agreement found, in the alternative, to be within the language of the proviso even if not part of a collective bargaining agreement because it was designed to alleviate job site friction).

Second, the PLA in this case was limited to the work to be performed on a project specific, multi-craft labor agreement, unlike *Connell* where the union sought the subcontracting clause from various employers on multiple projects.

Third, unlike the unions in *Connell,* the unions here did not proactively disclaim interest in representing Golden Queen's employees. Rather, Golden Queen simply chose to contract out all craft work, leaving no employees for the unions directly to represent, quite contrary to what Golden Queen had told the unions, all along, namely, that it would be directly hiring carpenters, electricians and other building craft employees.

Fourth, unlike *Connell,* there is no evidence in this case to support the notion that the sole reason for the PLA was to organize subcontractors through top-down secondary pressure.

Fifth, there was ample evidence of labor strife at the time that negotiations began for the instant PLA and the parties discussed picketing issues at various projects in the surrounding area. This resulted in a concerted effort by Golden Queen and the Unions to address the potential strife

through the PLA's specific provisions, which included, but are not limited to the provisions that provide:

- the stated purpose of the Agreement, to ensure that all construction work and related work performed by the members of the Unions on the Project shall proceed continuously, without interruption, in a safe and efficient manner, economically with due consideration for the protection of labor standards, wages and working conditions (¶ 2.1);
- the stated purposes to secure harmonious relations between the parties and the orderly performance of the work, along with the agreement of the parties to establish adequate and fair wage levels and working conditions and to protect the Project against strikes and lockouts and other interference with the process of the work (¶ 2.2);
- the Union recognition clause and the Union security clause (¶ 4.1, 4.2)
- the No-Strike clause (¶ 7.1) and
- the agreement of the parties to provide close cooperation between management and labor and labor's agreement to assign a representative to this Project for the purpose of completing the construction of the Project economically, efficiently, continuously, and without interruptions, delays, or work stoppages.

Finally, as explained above, the agreement addresses the *Denver Building Trades* problem of the close relationship between construction industry employers at a jobsite. That is, the agreement is between a council of construction unions and the party with the power to control jobsite labor relations, recognizing that Golden Queen had a close relationship with the

contractors that would actually perform the work. This close relationship was exemplified through Klingmann's testimony that with regard to its earth moving contractor, Guinn Construction, "So Guinn was a really actively involved in the project *under our direct control and management*." Thus, the PLA fulfills Congress' desire to prevent the extension of the *Denver Building Trades* artificial distinctions between construction industry employers by protecting *agreements* that recognize this close relationship.

VII

CONCLUSION

For all of the foregoing reasons, the complaint should be dismissed in its entirety.

Dated: February 16, 2016

Respectfully Submitted

Law Office of Ray Van der Nat
A Professional Corporation

/s/ Ray Van der Nat
RAY VAN DER NAT
Attorney for Respondent/Union

CERTIFICATE OF SERVICE

I hereby certify that I have caused an original version of the foregoing Brief in Support of Exceptions to the Decision of the Administrative Law Judge in .pdf format to be filed electronically with the Executive Secretary of the National Labor Relations Board on this 16th day of February 2016.

I further certify that I have caused copies of the foregoing Post-Hearing Brief in .pdf format, to be served via electronic mail and U.S. mail on the following:

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